

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On Its Own Motion

VS.

Commonwealth Edison Company

**Investigation of tariffs approved in
Docket No. 13-0386.**

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Docket No. 13-0553

OF THE ILLINOIS COMMERCE COMMISSION

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**REPLY BRIEF OF THE STAFF
OF THE ILLINOIS COMMERCE COMMISSION**

Staff of the Illinois Commerce Commission (“Staff”), by and through its counsel, pursuant to the direction of the Administrative Law Judges (“ALJs”) and Section 200.800 of the Illinois Administrative Code (83 Ill. Adm. Code 200.800), respectfully submits its reply brief in the above-captioned matter.

I. INTRODUCTION

On October 2, 2013, the Commission on its own motion, based upon a Staff report which raised questions concerning Commonwealth Edison Company’s (“ComEd”) tariff filing of May 30, 2013, and pursuant to the authority of Section 10-113(a) of the Act to rescind, alter or amend its order in Docket No. 13-0386, initiated a proceeding to determine whether the tariff changes filed by ComEd on May 30, 2013 in Docket No. 13-0386, comply with P.A. 98-15. The proceeding is to address the limited specific

questions whether the tariffs filed on May 30, 2013: (1) correctly calculated interest on ComEd's reconciliation balance, (2) correctly calculated the Section 16-108.5(c)(5) return on equity ("ROE") collar, and (3) correctly reflected the appropriate tax treatment in calculating interest on the reconciliation balance in the formula rate tariff as authorized by the Public Utilities Act. Illinois Commerce Commission, ICC Initiating Order Docket No. 13-0553, 2 (October 2, 2013).

An emergency status hearing was held on October 7, 2013, and the parties agreed to a schedule that would allow the Commission to issue an Order prior to November 30, 2013. The People of the State of Illinois, through Attorney General Lisa Madigan ("AG"), the Illinois Industrial Energy Consumers ("IIEC"), the Citizens Utility Board ("CUB"), and the City of Chicago ("City") were granted leave to Intervene. Staff witness Richard W. Bridal II submitted testimony in this case. ComEd and AG filed testimony independently, while the IIEC, City and CUB (collectively "CCI") filed testimony jointly.

An evidentiary hearing was held in this matter in Chicago, Illinois on October 24, 2013. On November 1, 2013, initial briefs ("IB") were filed by Staff, ComEd, AG, and CCI. Pursuant to the direction of the Administrative Law Judges, Staff's reply brief follows.

II. PA 98-15 COMPLIANCE

As set forth in Staff's initial brief the Commission should find that:

1. Tariffs filed on May 30, 2013 by ComEd do not correctly calculate interest on ComEd's reconciliation balance as authorized by the Public Utilities Act

("Act"), and that it is inappropriate and contrary to the Act to gross-up for taxes the interest rate provided for within the Act;

2. Tariffs filed on May 30, 2013 by ComEd correctly calculate the Section 16-108.5(c)(5) Return on Equity ("ROE") Collar as authorized by the Act; and
3. Tariffs filed on May 30, 2013 by ComEd correctly reflect the appropriate tax treatment (i.e., the reconciliation balance is not reduced by Accumulated Deferred Income Taxes) in calculating Interest on the reconciliation balance in the formula rate tariff as authorized by the Act.

Staff has already addressed the parties' positions in its IB, and will not repeat those arguments here. Thus, the omission of a response to an argument that Staff previously addressed simply means that Staff stands on the position taken in Staff's IB. However, regarding the issue concerning the correct calculation of interest on ComEd's reconciliation balance as authorized by the Act, below, Staff further addresses two points made by ComEd in its IB below. In addition, Staff sets forth in this reply brief the correct standard which must be met for the Commission to rule differently in this case than it did in Docket No. 13-0386.

- A. Do the tariffs filed on May 30, 2013 by ComEd correctly calculate interest on ComEd's reconciliation balance as authorized by the Public Utilities Act?

ComEd argues that since June 5, 2013, the date of the Commission's order in Docket No. 13-0386, the relevant facts and law have not changed in any way, and in the absence of any change in those circumstances, the Commission cannot rule any differently in this docket than it did in its final order in Docket No. 13-0386. (ComEd IB,

2.) The Commission should reject ComEd's argument. ComEd fails to recognize that the Commission can rule differently in this docket not only if there is a change in circumstances (fact or law) but also if there were any errors of law or fact in its order in Docket No. 13-0386. (See, Union Electric Co. v. Illinois Commerce Commission, 39 Ill.2d 386, 395 (1968); Black Hawk Motor Transit Co. v. Illinois Commerce Commission, 398 Ill. 542, 561-562 (1947).) This standard/requirement was set forth by the Supreme Court in the following passage in Union Electric:

In these proceedings however, Union was not charged with any act or omission in violation of the Public Utilities Act or any order, rule or regulation of the Commission. The Commission made no finding relating to any such violation, nor did it find that there were any errors of law or fact in its order of November 3, 1965, granting Union a certificate or that conditions had changed, requiring a rescission of that order....In the absence of such findings we believe that the Commission was without authority to effectively rescind Union's certificate.

Union Electric, at 395. The Supreme Court in Union Electric recognized that a Commission finding that a utility violated the Act or an order, rule or regulation of the Commission, or that there were errors of fact or law in the certificate order, or that conditions have so changed would warrant rescission of the prior order granting the certificate. A more recent case, Quantum Pipeline Co., noted the same standard/requirement as well. Quantum Pipeline Co. v. Illinois Commerce Commission, 304 Ill.App.3d 310, 321 (1999). Clearly the Commission is not just limited to a change in circumstances to rule differently in this docket. The Commission can rule differently not only if there are changes in circumstances, but also if there are errors of law or fact.

In Docket No. 13-0386 there was an error of law made by the Commission, and admittedly by Staff, in its review of ComEd's filing with respect to the interest rate to be

applied to the reconciliation balance. As Staff discussed in its initial brief, the plain language of PA 98-15 does not allow for the gross up of the interest rate, WACC. Staff will not repeat its legal analysis of Section 108.5(d)(1) here. (Staff IB, 4-7.) Since the Commission's June 5, 2013 Order approving ComEd's May 30, 2013 filing erroneously allowed for the interest rate to be grossed up, the Commission must correct that error of law in this proceeding.

If the Commission were to find that there was no error of law, which it should not, Staff's alternative position is that the robust record evidence in this proceeding addressing the grossing up the interest rate constitutes a change in circumstances which the Commission should consider in deciding whether to allow ComEd to gross up the interest rate on the reconciliation balance. For the reasons set forth below and in Staff's IB, the gross up of the interest rate applied to the reconciliation balance should not be allowed by the Commission. Again, Staff's main position is that neither Section 16-108.5(d)(1) nor PA 98-15 allows for the interest rate to be grossed up. Therefore, the Commission can and should correct the error of law made in its prior order in Docket No. 13-0386.

Staff further addresses two points made by ComEd in its IB on the issue of the gross up of the interest rate. First, ComEd states that the Act, by reference to HR 1157 and SR 821, requires that the utility or ratepayer be made whole. (ComEd IB, 6-7.) However, the Act specifically provides for the *interest rate* to make the utility or rate payer whole, and defines that interest rate as being *equal to* WACC. Contrary to the Company's desires, the Act does not provide for the interest rate to be grossed-up or altered in any manner. (Staff IB, 5-6.)

Second, ComEd states that there is nothing new or novel about a WACC gross-up when allowing a utility the opportunity *to earn the authorized return on rate base* when developing a revenue requirement. (ComEd IB, 3-4.) However, the issue in this proceeding is not in regards to the Company *earning an authorized return on rate base*. At issue in this proceeding is the proper, lawful calculation of *interest* on the reconciliation balance. (Staff IB, 4-5.) Interest on the reconciliation balance is not a component of rate base and should not be confused as such. (AG IB, 13-14.) As demonstrated in Staff's testimony and initial brief, it is not Commission practice to gross-up an interest rate that already represents the Act's (or the Administrative Code's) means to make the utility or ratepayer whole. (Staff Ex. 1.0, 4-5; Staff Ex.3.0, 3; Staff IB, 8-9.) ComEd's erroneous position that the Act allows the Company to earn an equity portion of WACC on the reconciliation balance leads to its flawed conclusion that ComEd will not recover its actual costs without the income tax gross up. (ComEd IB, 8.) The formula rate law provides for interest on the entire reconciliation balance even though a part of such balance is for income taxes that ComEd has not yet paid. Because income taxes are not owed until revenues are collected, ComEd will not have to pay the income taxes associated with the reconciliation balance until such amount is collected from ratepayers. Therefore, ComEd's statement that ComEd will not recover its actual costs without the income tax gross up is inaccurate because the carrying costs associated with the income tax portion of the reconciliation balance are a cost that would not have been *actually* incurred. (Staff Ex. 3.0, 3-4; Staff IB, 7-8.)

- B. Do the tariffs filed on May 30, 2013 by ComEd correctly calculate the Section 16-108.5(c)(5) return on equity ("ROE") collar as authorized by the Public Utilities Act?

Staff stands on the arguments made in its IB that the tariffs filed on May 30, 2013 by ComEd correctly calculate the Section 16-108.5(c)(5) Return on Equity ("ROE") Collar as authorized by the Act.

- C. Do the tariffs filed on May 30, 2013 by ComEd correctly reflect the appropriate tax treatments in calculating interest on the reconciliation balance in the formula rate tariff as authorized by the Public Utilities Act?

Staff stands on the arguments made in its IB that the tariffs filed on May 30, 2013 by ComEd correctly reflect the appropriate tax treatment (i.e., the reconciliation balance is not reduced by Accumulated Deferred Income Taxes) in calculating Interest on the reconciliation balance in the formula rate tariff as authorized by the Act.

III. IMPLEMENTATION OF RATE FORMULA CHANGES, IF ANY

There appears to be no disagreement on this issue. Staff stands on its position as described in its IB.

IV. CONCLUSION

WHEREFORE, for all of the following reasons, Staff respectfully requests that the Commission's order in this proceeding reflect all of Staff's recommendations.

Respectfully submitted,

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November 6, 2013

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